IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35135

ROCKY MOUNTAIN PHARMACEUTICALS, INC.,	)	**2009 Unpublished Opinion No. 599**
Plaintiff-Respondent,	)	**Filed: September 3, 2009**
v.	)	**Stephen W. Kenyon, Clerk**
BERT and TINA DeWINKLE, husband and wife, dba MOO RIAH BERTINA, INC.,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Defendants-Appellants.	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Judgment awarding damages in collection action, affirmed in part, vacated in part, and remanded.

Douglas W. Crandall, Boise, for appellants.

Harry C. DeHaan, Twin Falls,for respondents.

WALTERS, Judge Pro Tem

Bert and Tina DeWinkle, d/b/a Moo Riah Bertina, Inc., appeal from a judgment awarding damages to Rocky Mountain Pharmaceuticals, Inc. in the amount of $9,518.15. Additionally, the DeWinkles challenge the district court's denial of their motions for a directed verdict and judgment notwithstanding the verdict. For the reasons set forth below, we affirm in part, vacate the award of damages, and remand.

I.
FACTS AND PROCEDURE

The evidence presented at trial shows that, beginning in 1999, the DeWinkles purchased pharmaceutical supplies for their dairy farm from Scott Fife, a travelling salesman for Rocky Mountain. Throughout the course of their dealings, Scott delivered the DeWinkles supplies directly from his truck and presented them with an invoice. Scott regularly met with the DeWinkles regarding accumulated invoices during any given month which the DeWinkles then

paid by check identifying the invoice number in the memo line. On occasions when Scott did not have the supplies on his truck, they were ordered and shipped to the DeWinkles directly from Rocky Mountain. Rocky Mountain then sent the DeWinkles invoices for these supplies.

After a period of time, Rocky Mountain claimed that there was an accruing balance of unpaid invoices owed by the DeWinkles. The DeWinkles claimed that they received monthly statements from Rocky Mountain identifying twenty outstanding invoices which they, in fact, had paid and could present cancelled checks identifying the invoices to be paid in the memo line. The alleged outstanding balance was the subject of a meeting between the DeWinkles, Scott, and Harold Des Jardens, the president of Rocky Mountain. The result of this meeting is contested by the parties. The DeWinkles claim that Scott and Harold signed two statements acknowledging that all invoices had been paid and granting the DeWinkles a credit for overpayment as well as waiving all past and future finance charges and late penalties. Rocky Mountain acknowledges the two signed statements, but claims that there was an oral agreement that the debt would be satisfied upon its receipt of an agreed payoff amount which was never remitted.

Rocky Mountain filed suit on February 24, 2005, alleging damages of $15,269.54 in unpaid invoices with interest. Prior to trial, the DeWinkles filed a motion in limine to exclude any evidence of charges to the open account that arose prior to the four-year statute of limitation period. The district court granted the DeWinkles' motion and determined that any evidence of charges to the account made prior to February 24, 2001, were barred by the statute of limitation and would be inadmissible.[1]

At trial, the DeWinkles argued that there had been no breach because they could prove that they had paid each invoice identified as due and owing on the monthly statements sent to them by Rocky Mountain. Alternatively, they argued that the debt had been satisfied through accord and satisfaction, waiver, release, and waiver by estoppel. The DeWinkles made a continuing objection to the admission of evidence of debts incurred prior to the statute of limitation cutoff date. However, the district court admitted all of the invoices for products sold from Rocky Mountain to the DeWinkles from the commencement of their relationship in 1999 as well as summaries listing those invoices and the payments received through the corresponding

[1] A written order granting the DeWinkles' motion in limine is not included in the record, but the record reflects a telephonic hearing on the motion and the result of the hearing is apparent from the trial transcripts and is not disputed by the parties on appeal.

period. The DeWinkles moved for a directed verdict after the conclusion of Rocky Mountain's evidence arguing accord and satisfaction, that Rocky Mountain was not the real party in interest, and failure to establish the existence of an outstanding debt. The district court deferred judgment on accord and satisfaction and denied the motion as to the other grounds. The DeWinkles renewed this motion at the conclusion of their evidence and it was denied by the district court.

The jury returned a verdict finding that the DeWinkles had breached their agreement to pay for the pharmaceutical supplies and that they had failed to prove any of their affirmative defenses. The jury awarded damages to Rocky Mountain in the amount of $9,518.15. After the verdict, the DeWinkles again renewed their motion for a directed verdict[2] which was denied by the district court. Judgment was entered upon the jury's verdict. Rocky Mountain filed a motion for attorney fees as the prevailing party under Idaho Code Section 12-120. The district court denied the motion, reasoning that there was no prevailing party because the jury did not award Rocky Mountain the full amount owing plus interest which it requested. The DeWinkles appeal challenging the district court's denials of their motions for directed verdict and judgment notwithstanding the verdict (j.n.o.v.). Additionally, the DeWinkles challenge the admission of evidence of charges to the account prior to the cutoff date of the statute of limitation in violation of the district court's order in limine.

II.

ANALYSIS

A. Accord and Satisfaction

As noted above, the DeWinkles moved for a directed verdict at various stages of the trial arguing, among other things, that any outstanding debt had been satisfied through accord and satisfaction. The DeWinkles' motions were ultimately denied. The jury determined that the DeWinkles had not proven an accord and satisfaction. The DeWinkles argue that the district court erred by concluding that the two signed statements, which allegedly acknowledged that all invoices had been paid in full and waived past and future finance charges, were not sufficiently unequivocal, unambiguous, and definite statements to constitute an accord and satisfaction. When a court reviews a motion for j.n.o.v., the motion is treated as a delayed motion for a directed verdict, and the reviewing court applies the same standard for both. *Leavitt v. Swain,*

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[2] More correctly worded, the DeWinkles sought a judgment notwithstanding the verdict.

133 Idaho 624, 628, 991 P.2d 349, 353 (1999); *Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986). In light of the DeWinkles' motion for a directed verdict and multiple renewed motions for a directed verdict, and because the same standard applies at each point in the trial, we need only review the denial of the DeWinkles' motion renewed after the return of the jury's verdict.

Whether a verdict should be directed is purely a question of law upon which the parties are entitled to full review by the appellate court without special deference to the views of the trial court. In determining whether the motion for j.n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally. *Quick*, 111 Idaho at 764, 727 P.2d at 1192. The issue to be determined on a motion for j.n.o.v. is whether substantial evidence supports the jury's verdict. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 495, 943 P.2d 912, 921 (1997). Substantial evidence does not require that the evidence be uncontradicted. *Highland Enterprises, Inc., v. Barker*, 133 Idaho 330, 337, 986 P.2d 996, 1003 (1999). Rather, the evidence need only be of sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper. *Id*. Upon a motion for j.n.o.v., the moving party admits the truth of all adverse evidence and all inferences that can legitimately be drawn from it. *Id.* In ruling on a motion for j.n.o.v., the trial court cannot weigh the evidence, assess the credibility of the witnesses, or make its own factual findings and compare them to those of the jury. *Id.* The trial court draws all inferences in favor of the nonmoving party. *Id.* The motion should be granted only where there can be but one conclusion as to the verdict that reasonable minds could have reached and when that conclusion does not conform to the jury verdict. *Id.* The function of a j.n.o.v. is to give the trial court the last opportunity to order the judgment that the law requires. *Quick*, 111 Idaho at 764, 727 P.2d at 1192.

In this case, the DeWinkles present a cogent argument concerning the district court's allegedly flawed analysis. However, in reviewing a question of law de novo, we do not give any special deference to the views of the district court. Instead, we examine the evidence according to the standard outlined above to determine whether a directed verdict or j.n.o.v. should have been granted. There was considerable time devoted at trial to the meeting between the DeWinkles, Scott and Harold, the resulting signed statements and the issue of accord and satisfaction. The first of these statements provided: "Paid all due Inv + took credit #49478 As

per [Scott], [Harold]." The second statement provided: "All Fin. charges, late charges or penaltys waived from Rocky Mountain Pharm. Pres + Past history. Promised by [Scott] + [Harold]." These statements were admitted into evidence and then substantial testimony was devoted to their explanation.

During the testimony of Scott at trial, counsel for the DeWinkles questioned Scott regarding his familiarity with invoice summaries that were being presented at trial. When counsel for Rocky Mountain further questioned Scott, the following exchange took place:

> [COUNSEL]: [Scott], did you waive the finance charges?
> [SCOTT]: Yes, but as per a verbal agreement on all the invoices.
> [COUNSEL]: And what was the agreement to waive the finance charges?
> [SCOTT]: If it was paid on that date.
> [COUNSEL]: Was it paid?
> [SCOTT]: No.

Later, during direct examination of Scott by Rocky Mountain's counsel, Scott testified concerning the payoff amount that he and Harold wanted to collect at their meeting with the DeWinkles:

> [COUNSEL]: And so if you took the $10,600 and calculated it 2 percent per month until paid, would that give you the amount of finance charges due and owing?
> [SCOTT]: Yes, sir.
> [COUNSEL]: Is the $10,600 the amount that you tried to collect on [the date of the meeting]?
> [SCOTT]: I -- yes, sir.
> [COUNSEL]: And did you manage to collect that?
> [SCOTT]: No.
> . . . .
> [COUNSEL]: Now, there is some discussion about an agreement to waive all the finance charges.
> [SCOTT]: Yes.
> [COUNSEL]: Did you make such an agreement?
> [SCOTT]: Verbal, yes, sir.
> [COUNSEL]: And what were the conditions of that agreement?
> [SCOTT]: [The DeWinkles] wanted copies of all the -- all the invoices from start to finish that we had -- we had done, from the beginning before I even was there to current.
> [COUNSEL]: Okay.
> [SCOTT]: Which I got. I had those overnighted to me.
> . . . .
> [COUNSEL]: What was the deal to waive the finance charges?

[SCOTT]: Oh, she would -- wanted the invoices. I provided the invoices, everything that she had. We would waive all the financial charges and settle on a sum.

. . . .

[COUNSEL]: Did you agree on a settlement number?

[SCOTT]: I'm -- yes.

[COUNSEL]: And what was that number?

[SCOTT]: I believe we settled that day was -- this is verbal, but a check, I believe, for $9500.

[COUNSEL]: And if she'd have wrote you that one, everything would have been paid in full?

[SCOTT]: Yes.

[COUNSEL]: And instead, what did you get?

[SCOTT]: Nothing.

[COUNSEL]: So the agreement is no good?

[SCOTT]: Yes.

Scott also confirmed that it was Rocky Mountain's position that the meeting resulted in a standoff with the DeWinkles claiming they did not owe anything and Rocky Mountain claiming that they did. On cross-examination, counsel for the DeWinkles questioned Scott regarding the meaning of the note providing that all invoices had been paid and how the alleged verbal agreement of the payoff amount was never reduced to writing.

After Scott, Rocky Mountain called Harold as a witness, and he testified regarding the disputed meeting and signed statements:

[COUNSEL]: So how did you happen to meet the DeWinkles and how was the meeting arranged and --

. . . .

[HAROLD]: That's been a few years ago. But I can tell you in summation they owed 10- to $12,000. We offered them someplace between 7,500 and 9,500. Hey, you go ahead and pay this, we'll knock off the finance charges. Let's be friends. Let's keep buying. And then you buy and you pay invoice by invoice. We won't have this problem.

. . . .

[COUNSEL]: And did you do a calculation while you were there and admit that you were wrong and there was nothing due and owing?

[HAROLD]: Absolutely not.

[COUNSEL]: Why not?

[HAROLD]: Sir, I've been playing this game for 40 years. I'm almost 70 years old. I'm really good, details. But on dollars and inventory turns and cash flow, I've learned to survive.

And we went out there for the purpose -- because the dairy industry was in a terrible deficit. They were negative cash flow, and there were some very tough

times. And rather than to fight over a lot of details, I think the bill at that time was 12- or $14,000. And we said, give us like 85- or 9,500. We'll walk away. You'll be happy. We'll be happy. And then we'll keep you 100 percent on COD so this won't happen again. That in gist is exactly what we meant to do. The problem is we agreed -- and shook hands. There's only one little basic problem.

[COUNSEL]: What's that problem?

[HAROLD]: We reversed the finance charge. And she said as soon as she got the total details, she would immediately pay the check. Apparently she has selective memory, because that did not happen, sir.

[COUNSEL]: Did Tina DeWinkle agree to pay this debt?

[HAROLD]: She looked me in the eye and shook my hand, as an honorable lady, agreed to pay that bill, sir.

[COUNSEL]: Did she pay it?

[HAROLD]: No, sir.

During cross-examination, the following exchange occurred between Harold and counsel for the DeWinkles:

[COUNSEL]: I'm talking about, was there a document generated as a result of that meeting that set forth the terms of your agreement that there was an 8- to $10,000 agreement that you would get paid?

[HAROLD]: This is what we agreed upon.

[COUNSEL]: Was there a document?

[HAROLD]: I shook the lady's hand. And she as an honorable lady said she would pay this if we did this.

[COUNSEL]: Was there a document?

[HAROLD]: Not to my knowledge.

. . . .

[COUNSEL]: Please examine the check that's adjacent to invoice number 49748, and let me know when you've had an opportunity to examine that.

. . . .

[COUNSEL]: Okay. Do you recognize that in the memo column it says, Paid in full and Owe you credit, Initialed [by Harold]?

. . . .

[HAROLD]: That was the one invoice. That one invoice was paid in full, not the whole thing. Come on.

. . . .

[COUNSEL]: So you received money on the date. There was consideration paid on that date for that agreement. Agreed?

[HAROLD]: One invoice was paid, not the total bill, sir.

After the testimony of Harold, Rocky Mountain rested its case and the DeWinkles made their first motion for a directed verdict.

The DeWinkles called Scott again as a witness and, on cross-examination, counsel for Rocky Mountain asked him concerning the check which Harold claimed only paid one invoice and not the entire debt. Scott confirmed that the check only paid one invoice for business conducted on the date of the meeting, not the entire disputed debt. Tina DeWinkle testified concerning her recollection of the meeting:

> [DEWINKLE]: Well, Scott called earlier that morning and he said, there's a gentleman called [Harold] in town.
>
> I said okay.
>
> He said, well, that's the gentleman that owns Rocky Mountain Pharmaceuticals in California, and he would like to go over the bill with you.
>
> And I said, that'll be fine.
>
> So they came to the office around 10:00. And we sat down that -- but when he came walking in, he said, before we get started, why don't you just make me a check of $10,000, and we'll call it even.
>
> And I said, well, why would I want to do that? I need the invoice that has to go with that much money.
>
> He said, well, the milk price is up. And why don't you just pay me money, and then I'll be on my way, and we'll -- we won't harass you anymore.
>
> And I said to him, but, Scott, I've always paid every invoice.
>
> . . . .
>
> [COUNSEL]: Let me stop you right there, Tina. Did you ever at any time agree . . . to pay either Scott or Rocky Mountain Pharmaceuticals any money.
>
> [DEWINKLE]: Never. Because -- he asked for money.

Later, she testified concerning the signed statements:

> [COUNSEL]: And are these documents reflective of the entire agreement?
>
> [DEWINKLE]: Correct.
>
> [COUNSEL]: And the agreement was that you had paid all due invoices and took credit for invoice number 49748 as per Scott?
>
> [DEWINKLE]: As per Harold and Scott.
>
> . . . .
>
> [DEWINKLE]: Well, first [Harold] signed the check right here and he put his initial that everything is paid in full after the meeting. But because he was so aggressive when he came to the barn, I thought, hmm, I don't know. I'm going to have him sign a piece of paper that says it more simple.
>
> So I took a little notepad when I had on my desk. . . . And I wrote on it, paid all -- all due invoices and [took] credit 49748 as per Scott and Harold.
>
> . . . .
>
> And I went and put that piece of paper on a clipboard. I went to Scott and Harold and said, you know, we went through all the invoices. We went through the bill. But I'd feel real comfortable if you would sign that piece of paper.

> And he said, oh, no problem, and he signed it. . . .
>
> . . . .
>
> [DEWINKLE]: Correct. Also during that meeting, they always said, we're just talking invoices. There will never be any finance charges, late charges, or anything.
>
> [COUNSEL]: Okay.
>
> [DEWINKLE]: But I hadn't written that on that note. So when Scott came back with the delivery . . . I got thinking, hmm, I'd better have him sign that piece of paper just in case he changes his mind.
>
> And so when Scott came in the office with the merchandise I said, oh, Scott, by the way, remember when you and Harold promised there would be no finance charges and late charges and anything?
>
> He says, yes.
>
> I said, would you mind signing a piece of paper?
>
> He said, no, that's what we promised. That's when Scott signed that [note waiving finance charges].

After Tina DeWinkles' testimony, the DeWinkles rested and renewed their motion for a directed verdict.

Viewing the evidence in the record in the light most favorable to the nonmoving party--Rocky Mountain--we conclude that there was substantial evidence presented to the jury from which it could determine that the DeWinkles and Rocky Mountain agreed upon a payoff amount which would satisfy the debt which the DeWinkles thereafter failed to remit. The jury could also reasonably conclude that the DeWinkles' failure to pay nullified the agreement reflected in the signed statements that all invoices had been paid in full and waiving finance charges. Therefore, we cannot conclude that a directed verdict or judgment notwithstanding the verdict should have been granted. Accordingly, the district court did not err by denying the DeWinkles' motion.

B. Statute of Limitation

The DeWinkles argue that the jury was improperly allowed to consider charges to their unilateral open account with Rocky Mountain incurred prior to the statute of limitation cutoff date of February 24, 2001. The DeWinkles filed a motion in limine prior to trial arguing against the inclusion of such evidence which was granted by the district court. However, the DeWinkles contend that the district court erroneously allowed the admission of invoices and summaries detailing charges and payments made on the account dating back to 1999. Rocky Mountain

responds that the DeWinkles are trying to impermissibly retry the jury's factual finding of the amount of damages.

Rocky Mountain is correct that the jury's award of damages is a finding of fact. However, the issue of whether the jury considered impermissible evidence that the district court erroneously admitted against the statute of limitation and the district court's ruling in limine is a question of law. In articulating the proper standard of review for mixed questions of law and fact, this Court will differentiate among the fact-finding, law-stating and law-applying functions of the trial courts. *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct. App. 1986). Appellate judges defer to findings of fact based upon substantial evidence, but they review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Id*. If the jury in this case considered impermissible evidence in reaching its award of damages, a new trial on the issue of damages would be necessary. To overturn a jury verdict and award a new trial, a court must: (1) find that the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict; and (2) conclude that a retrial would produce a different result. *Lanham*, 130 Idaho at 498, 943 P.2d at 924; *Heitz v. Carroll*, 117 Idaho 373, 378, 788 P.2d 188, 193 (1990).

In this case, it is clear that the jury had access to impermissible evidence barred by the applicable statute of limitation and the district court's ruling on the DeWinkles' motion in limine. The district court ruled that no evidence of debts incurred prior to the cutoff date of February 24, 2001, could be considered. However, the district court later admitted copies of all invoices between the DeWinkles and Rocky Mountain, some of which dated back to 1999. These exhibits were available to the jury during deliberations. The district court also allowed the admission of various summaries prepared by Rocky Mountain detailing dates, invoice amounts, finance charges, and payments received over the course of dealings between the DeWinkles and Rocky Mountain again dating back to 1999. The jury was also allowed to consider these summaries in its deliberations.

One of these summaries, identified as Plaintiff's Exhibit Nos. 228A, 229A, and 230A, is a spreadsheet listing the invoices and payments and culminating in a grand total of charges and payments from 1999 through 2004. According to the summary, the DeWinkles incurred charges in the amount of $128,472.52 over that period and made payments in the amount of $118,954.37.

During closing argument, trial counsel for Rocky Mountain told the jury: "So we're going to ask you, ladies and gentlemen, for the difference on the bottom of 230-A between purchases of 128,000, payments of 118,000 and the interest of 2 percent a month on the unpaid balance." It appears that the jury arrived at its calculation of damages in the amount of $9,518.15 by doing just as Rocky Mountain's counsel suggested by subtracting the total of charges dating from 1999 through 2004 from the total of payments dating from 1999 through 2004 as reflected by Exhibit 230-A. The district court did not instruct the jury to disregard any of the debt that existed on or prior to February 24, 2001. Thus, it appears that the jury improperly considered impermissible evidence barred by the statute of limitation and the district court's ruling in limine. If the jury's calculation of damages was based on inadmissible evidence, we cannot conclude that it was supported by substantial evidence. Consequently, justice would require vacating the award.

We next consider whether vacating the award of damages and ordering a new trial on that limited issue would produce a different result. When asked regarding the concern with presenting summaries to the jury with charges barred by the statute of limitations, the following exchange occurred between the district court and Rocky Mountain's trial counsel:

> [COURT]: All right. But how do you deal with the issue of the statute of limitations?
>
> [COUNSEL]: Well, because, as you can see, Your Honor, they're constantly paying it off and having new charges. And --
>
> [COURT]: But what's the operative date? July 2001? Is that when it was?
>
> [COUNSEL]: Yes.
>
> . . . .
>
> [COURT]: Is the cutoff date in terms of statute of limitations? I can't remember.
>
> . . . .
>
> [COURT]: Is that right? It seems like that's what I remember reading someplace.
>
> [DEWINKLE'S COUNSEL]: Yeah.
>
> [COURT]: Well, on this document it shows 2,118.72.
>
> [COUNSEL]: But you'll see that immediately after that there's a $3300 check which is applied to that balance and would take that balance to zero. And then there are new purchases and new checks.
>
> [COURT]: Okay. Let's see. No. The balance in July of 2001 is $2,118.72.
>
> [COUNSEL]: Correct.
>
> [COURT]: So how is that not outside --
>
> [COUNSEL]: Well, but that balance was paid off in August with a check 9126, of $3300.81.

[COURT]: Oh, and then the new charges of 3567.
[COUNSEL]: Right.
[COURT]: Okay. All right. I see what you're saying. Okay.

It is important to note that the district court and the attorneys for both parties were mistaken in their use of July 2001 as the cutoff date for the statute of limitation. The correct date was February 24, 2001, four years prior to the time of filing the complaint. It appears that the district court allowed the summaries with barred charges because of counsel's representations that there was no balance in August 2001. Whether there was no account balance in August 2001 is irrelevant to the determination of whether the summaries could show charges prior to February 2001.

It remains to be determined what amount Rocky Mountain would be entitled to, if any, if only charges incurred after February 24, 2001, were allowed. Such a fact-finding endeavor is best left in the province of the jury and the district court. However, to a limited extent, we must examine the invoices in order to determine whether any purpose would be served by ordering a new trial on the issue of damages. We have reviewed all of the invoices in this case post-dating February 24, 2001, as well as the summaries admitted at trial. We conclude that there was an owed balance at the statutory cutoff that is barred from collection under the statute of limitation. Because there was a negative balance on that date, the summary in Exhibits 228-A, 229-A, and 230-A, and its total calculation of charges which the jury used in awarding damages, is inaccurate. Accordingly, a new trial on this issue would result in a different calculation of damages than that which was awarded by the jury. The jury's award was not supported by substantial, admissible evidence. Were the jury allowed to consider only evidence not barred by the applicable statute of limitation, the result would have been different. Therefore, justice requires that we vacate the jury's award of damages and remand for a new trial on this limited issue.

In light of some additional arguments made by the DeWinkles on appeal and the confusion caused by the accounting and summaries in this case, we offer the district court guidance on remand. In accordance with the statute of limitation and the district court's order in limine, no debt incurrent prior to February 24, 2001, may be considered by the jury in its award of damages. The DeWinkles claim that some of the information in the summaries is inaccurate because they include invoices with a date in March 2001 when the debt was actually incurred

prior to the statute of limitation cutoff date. Any confusion on this issue must be resolved by determining the actual date the debt was incurred. The jury must determine the amount of the debt incurred after February 24, 2001. The jury must not be allowed to consider, in its damages calculation, any evidence of payments on the account made by the DeWinkles following February 24, 2001, that applied to any debt incurred in the account prior to February 24, 2001.

The DeWinkles argue that the statute of limitation bars only the collection of a debt and not the application of their payments dating back to 1999 to the debt incurred after February 24, 2001. We disagree. The DeWinkles should be allowed to apply only their payments made to debts incurred after the statute of limitation cutoff. In other words, the evidence to be considered by the jury must consist only of the amount of the debt incurred after February 24, 2001, and the amount of payments made by the DeWinkles on that debt following February 24, 2001, and not to the payment of any portion of the debt arising prior to February 24, 2001.

C. Attorney Fees at Trial

The DeWinkles argue that if this Court affords them relief on appeal, in whole or part, they should be declared the prevailing party at trial and awarded mandatory attorney fees pursuant to I.C. § 12-120(3).[3] However, the DeWinkles did not request attorney fees in the district court. Therefore, the DeWinkles' argument is essentially that they would have sought attorney fees had there been no errors at trial and the jury found in their favor. The cases which the DeWinkles cite as support do not stand for such a broad proposition. Additionally, our holding today does not make the DeWinkles the prevailing party at trial. We merely conclude that an error occurred in the computation of damages and that a new trial on this issue is necessary. Accordingly, we do not award the DeWinkles attorney fees at the trial level.

D. Attorney Fees on Appeal

The DeWinkles claim that they are entitled to attorney fees on appeal pursuant to I.C. § 12-120(3). The mandatory attorney fee provisions of I.C. § 12-120 govern on appeal as well as in the trial court. *Sanders v. Lankford*, 134 Idaho 322, 327, 1 P.3d 823, 828 (Ct. App. 2000). The Idaho Supreme Court has held:

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[3] Idaho Code Section 12-120(3) provides, in pertinent part: "In any civil action to recover on an open account . . . the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs."

> Where, as here, there are claims, counterclaims and cross-claims, the mere fact that a party is successful in asserting or defeating a single claim does not mandate an award of fees to the prevailing party on that claim. The rule does not require that. It mandates an award of fees only to the party or parties who prevail "in the action."

Israel v. Leachman, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003), *quoting Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 693, 682 P.2d 640, 646 (Ct. App. 1984). In this case, the DeWinkles have prevailed on the issue that the jury was improperly allowed to consider evidence barred by the statute of limitation and the district court's ruling in limine. However, they have not prevailed on their claim that the district court should have granted their motion for a directed verdict or judgment notwithstanding the verdict releasing them from liability altogether. Therefore, we conclude that the DeWinkles are not the prevailing party in this action and are not entitled to attorney fees on appeal. We do award the DeWinkles costs on appeal.

III.

CONCLUSION

There was sufficient evidence presented at trial to support a reasonable conclusion that there was no accord and satisfaction based on the two signed statements acknowledging that all invoices had been paid in full and waiving finance charges. Therefore, the district court did not err by denying the DeWinkles' motions for a directed verdict and judgment notwithstanding the verdict. Accordingly, we affirm the judgment as to the DeWinkles' liability on the debt. The jury improperly considered inadmissible evidence of debts incurred prior to the cutoff date of the applicable statute of limitation when it calculated its award of damages. Had the jury not considered the inadmissible evidence, the result would have been different. Therefore, the award of damages in the amount of $9,518.15 in favor of Rocky Mountain is vacated, and the case is remanded for a new trial on the limited issue of damages consistent with the opinions expressed herein. The DeWinkles are not the prevailing party at trial or on appeal. Accordingly, we do not award them attorney fees. Costs, but not attorney fees, are awarded to the DeWinkles on appeal.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**